

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates

Docket No. G02-45

SPECIAL MASTER'S ORDER ON
PREMERA'S MOTION TO EXCLUDE
SUPPLEMENTAL REPORT AND
TESTIMONY OF AARON KATZ

This matter comes before me on "Premera's Motion to Exclude Supplemental Report and Testimony of Aaron Katz Exceeding Scope of Original Report," dated March 17, 2004. I have considered the Motion; the OIC Staff's Response and Intervenor's Opposition, both dated March 25, 2004; and Premera's Reply, dated March 29, 2004. Premera moves for an order 1) excluding the Supplemental Report of Aaron Katz, and 2) precluding any testimony at the hearing by Mr. Katz that exceeds the scope of his original report. Premera's motion is based on Intervenor's failure to make Mr. Katz available for a deposition within the period required by the Commissioner's Twenty-Fifth Order.

Discussion: The Commissioner's "Twenty-Fifth Order: Order Extending Case Schedule," dated January 9, 2004, *inter alia*, established 1) a February 5, 2004 deadline for Premera to amend its Form A filing, 2) a March 12, 2004 deadline for testifying experts to file supplemental reports addressing the effects of Premera's amended Form A filing, 3) a March 22, 2004 deadline for depositions of testifying experts concerning their

supplemental reports, 4) a March 31, 2004 deadline for pre-filed direct testimony, and 5) an April 15, 2004 deadline for pre-filed responsive testimony.

The Intervenors timely submitted Mr. Katz's 9-page supplemental report on March 12, 2004. Consistent with the Twenty-Fifth Order, the parties apparently made testifying experts who had filed supplemental reports available for depositions before March 22, with the exception of Mr. Katz. Mr. Katz was out of the United States from March 3, 2004 until April 1, 2004 on a previously scheduled trip related to his work for the Packard-Gates Population Leadership Program.

Mr. Katz was unable to both complete his Supplemental Report and to submit to deposition concerning such report before his scheduled March 3 departure. Mr. Katz would likely have been available to timely complete his supplemental report and submit to deposition concerning such report if the Case Schedule established in the Commissioner's Eleventh, Twelfth and Thirteenth Orders had been maintained, instead of being re-set by the Twenty-Fifth Order to permit Premera to amend its Form A filing.

I assume for purposes of the present ruling that the Commissioner has the authority to grant Premera's motion. (My own authority derives from the Commissioner's authority.) The Administrative Procedures Act ("APA") vests the presiding officer, here the Commissioner, with the authority to "regulate the course of the proceedings, in conformity with applicable rules and the prehearing order, if any." RCW 34.05.449(1).

The Office of the Insurance Commissioner has both the powers expressly granted to it "and those necessarily implied from [its] statutory delegation of authority." *Tuerk v. Dept. of Licensing*, 123 Wn.2d 120, 124-25 (1994). Here, for the Commissioner to have

effective authority to regulate this proceeding in conformity with the Prehearing Order, he must necessarily have the authority to exclude evidence inconsistent with such order.

Further, WAC 10-08-200(4) provides that in an adjudicative proceeding before a state agency, “the presiding officer shall have authority to “[r]ule on procedural matters, objections, and motions.” The regulation of evidence, including the exclusion of evidence to enforce a pretrial order, is a “procedural matter” within the scope of WAC 10-08-200(4).

Though the Commissioner has the authority to exclude Mr. Katz’s Supplemental Report and to preclude Mr. Katz’s testimony at the hearing to the extent that it exceeds the scope of his original report, I do not believe such relief is appropriate under the circumstances. Mr. Katz’s unavailability for deposition during the period from March 3, when he reasonably completed his Supplemental Report, through March 22, 2004, the deadline for his deposition concerning such report, was not a deliberate evasion of the Twenty-Fifth Order. Instead, such unavailability was among the vagaries of this complex proceeding. The delay in Premera’s deposition of Mr. Katz concerning his Supplemental Report, while regrettable, is not likely to cause Premera significant prejudice, particularly considering the scheduling adjustments provided in the present order. //

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Ruling: Premera's motion for an order excluding the Supplemental Report of Aaron Katz and precluding any testimony by Mr. Katz at the hearing that exceeds the scope of his original report is denied. *Except that,* 1) Mr. Katz shall be subject to deposition by Premera concerning his Supplemental Report at the earliest date reasonably convenient to Premera and to Mr. Katz, but not later than April 8, 2004. 2) Premera's deadline for pre-filed testimony responsive to Mr. Katz is extended to April 26, 2004.

DATED this 1st day of April, 2004

George Finkle
Superior Court Judge, Retired
Special Master